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## ORGANIZED CRIME AND NATIONAL SECURITY: A DUBIOUS CONNECTION?

Liz Campbell\*

*This article problematizes the growing tendency to characterize organized crime as a national security threat, referring primarily to the situation in the United Kingdom but also drawing on international and comparative examples. Three distinct arguments are presented contesting this comparison. First, it is questionable whether either concept is sufficiently clear in a definitional sense for the comparison to be meaningful analytically. The second empirical argument suggests that organized crime, as it is defined and encountered usually in the United Kingdom, does not yet constitute such a threat. Third, and regardless of the validity of the preceding arguments, it is argued in a normative sense that such a comparison should be resisted to the greatest extent possible, given the extraordinary legal consequences it entails. These claims indicate how caution must be exercised in making such a connection.*

**Keywords:** *organized crime, national security, criminal behaviour*

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## INTRODUCTION

It is not uncommon to see organized crime described as a national security threat, in political discourse and in official documents, at both domestic and international levels. So organized crime appears to straddle a number of worlds: it is a form of crime, but also has in some respects moved to being a political issue, and on to a matter of national security. This elevation has certain consequences, including the allocation of greater resources, the creation of specific state entities, the alteration of police operations,<sup>1</sup> and a deeper involvement of intelligence agencies.<sup>2</sup> Much has been written on the empirical dimensions of organized crime as a national security threat, and on the ramifications of this for investigative tactics in different jurisdictions; less attention has been paid to the potential legal procedural consequences. Although this article takes the context and law in the United Kingdom as its primary focus, the arguments presented are relevant in a comparative sense and resonate broadly.

This article begins by identifying the growing trend worldwide whereby organized crime is seen as threatening states themselves. This may be characterized as the “securitization” of organized crime, a phenomenon that is evident in some jurisdictions like the Republic of Ireland. Political and executive discourse indicates that the United Kingdom is on the cusp of a shift in terms of connecting organized crime to national security. This article challenges the comparison in the British context, presenting three discrete arguments in this regard. First, it is questionable whether either concept can be defined clearly, thereby undermining the analytical meaning or value of such a comparison. The second empirical argument is that

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1. See Clive Harfield, *Paradigm Not Procedure: Current Challenges to Police Cultural Incorporation of Human Rights in England and Wales* 4 PUB. SPACE: J.L. & SOC. JUST. 91, 92 (2009); James Sheptycki, *Global Law Enforcement as a Protection Racket: Some Sceptical Notes on Transnational Organised Crime as an Object of Global Governance*, in TRANSNATIONAL ORGANISED CRIME: PERSPECTIVES ON GLOBAL SECURITY 42–59 (Adam Edwards & Peter Gill eds., 2006); LES JOHNSTON & CLIFFORD SHEARING, GOVERNING SECURITY: EXPLORATIONS IN POLICING AND JUSTICE (2002); Conor O'Reilly & Graham Ellison, “Eye Spy Private High”: *Re-Conceptualizing High Policing Theory*, 46 BRIT. J. CRIMINOLOGY 641–60 (2006).

2. The Security Service Act 1996 amended the function of the Security Service to act in support of the activities of police forces and other law enforcement agencies in the prevention and detection of serious crime. It works with the Serious Organised Crime Agency (SOCA), which was established in 2006 by the Serious Organised Crime and Police Act 2005.

organized crime, as it is defined and encountered usually in the United Kingdom, does not yet constitute such a threat. Third, and regardless of the validity or persuasiveness of the preceding arguments, it is argued in a normative sense that such a comparison should be resisted, given the extraordinary legal consequences it entails. Deploying the notion of national security has different legal impacts, in terms of the creation of law, the application of existing law, and ultimately derogation from the law. Overall, these arguments resonate in jurisdictions beyond the United Kingdom, and given these legal implications, caution is warranted before this comparison is adopted and then acted upon.

## I. ORGANIZED CRIME AS A NATIONAL SECURITY THREAT—THE INTERNATIONAL CONTEXT

Organized crime is viewed by scholars and practitioners alike as an especially sophisticated, systematic, and grave form and means of criminality; nonetheless, until relatively recently it was seen globally as a matter of law enforcement that could be addressed through the usual processes and channels of criminal investigation and prosecution. This view began to shift in the 1980s, when it was felt that organized crime underwent a transformation to something that could jeopardize “the viability of societies, the independence of governments, the integrity of financial institutions, and the functioning of democracy.”<sup>3</sup> In particular, throughout the 1990s transnational organized crime rose on the policy agenda of the United States and was redefined as a security issue; this characterization was met with acquiescence by other national governments.<sup>4</sup> In essence, what occurred was a replacement of the dangers associated with the Cold War with the notion of transnational organized crime,<sup>5</sup> and a shift from viewing organized crime

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3. Phil Williams & Ernesto Savona, *Problems and Dangers Posed by Transnational Organized Crime in the Various Regions of the World*, in THE UNITED NATIONS AND TRANSNATIONAL ORGANIZED CRIME, 1–42, 2 (1996).

4. PETER ANDREAS & ETHAN NADELMANN, *POLICING THE GLOBE: CRIMINALIZATION AND CRIME CONTROL IN INTERNATIONAL RELATIONS* 158 (2006).

5. Adam Edwards & Peter Gill, *The politics of transnational organised crime: Discourse reflexivity and the narration of threat*, 4 BRIT. J. POL. & INT’L REL. 245–70, 252 (2002); ANDREAS & NADELMANN, *supra* note 4, at 158; David Felsen & Akis Kalaitzidis, *A Historical Overview of Transnational Crime*, in HANDBOOK OF TRANSNATIONAL CRIME & JUSTICE 3–19, 3 (Philip L. Reichel ed., 2005).

as a criminal law or criminological challenge to a matter of national security.<sup>6</sup>

This perception soon gained force internationally, and in 1994 the *Naples Political Declaration and Global Action Plan against Organized Transnational Crime* expressed deep concern “about the dramatic growth of organized crime over the past decade and about its global reach, which constitute a threat to the internal security and stability of sovereign States.”<sup>7</sup> The context and nature of crime were deemed to have changed, resulting in large part from the forces of globalization, which also altered the responses needed.<sup>8</sup> So, it is now commonplace to describe organized crime as something that threatens the state as well as individuals or a people.<sup>9</sup> In this vein, the European Commission views organized crime as a potential threat to the union’s internal security,<sup>10</sup> while the United Nations has spoken about the evolution of transnational organized crime into a strategic threat to governments, civil societies and economies.<sup>11</sup>

## II. THE SECURITIZATION OF ORGANIZED CRIME

Building on such rhetoric, it appears that organized crime has been “securitized” in some jurisdictions. Securitization is a concept developed by

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6. Thomas Naylor, *From Cold War to Crime war: The search for a new “national security threat”*, 1 *TRANSNAT’L ORGANIZED CRIME* 37–56, 38.

7. *Report of the World Ministerial Conference on Organized Transnational Crime*, Naples Political Declaration and Global Action Plan against Organized Transnational Crime, ¶ 5 (Nov. 21–23, 1994), <http://www.imolin.org/imolin/naples.html>. Also see L. Shelley, *Transnational organized crime: An imminent threat to the nation-state?*, 48 *J. INT’L AFF.* 463–89 (1995).

8. Birmingham Group of Eight Summit Statement: Drugs and International Crime (May 16, 1998), <http://www.library.utoronto.ca/g7/summit/1998birmingham/drugs.htm>.

9. See Christopher D. Ram, *Meeting the challenge of crime in the global village: An assessment of the role and future of the United Nations Commission on Crime Prevention and Criminal Justice*, 30 (HEUNI Report Series No. 73, 2012), <http://www.heuni.fi/en/index/publications.html>.

10. European Commission, Communication from the Commission to the European Parliament and the Council, *The EU Internal Security Strategy in Action: Five steps towards a more secure Europe* (Brussels, 22.II.2010 COM(2010) 673 final), <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0673:FIN:EN:PDF>.

11. United Nations Office on Drugs and Crime, *Action Against Transnational Organized Crime and Illicit Trafficking, Including Drug Trafficking 2011–2013*, 10 (Apr. 2011).

Buzan, Wæver, and Wilde,<sup>12</sup> and essentially is the characterization and acceptance of certain issues as security threats. Securitization may be defined more precisely as the positioning through political speech acts of a particular issue as a threat to the survival of a given entity, which in turn (with the consent of the relevant constituency) enables the suspension of “normal politics” to deal with it.<sup>13</sup> The invocation of security is a political choice that allows the state to exercise special powers to handle an existential threat to a particular object, and may ultimately lead to less democratic control and constraint.<sup>14</sup>

The entity or object under threat need not be the nation-state, but could be a people or society, for example. As will be considered further below, the most orthodox types of threat are to national security, which is described by Buzan et al. as that with a focus on “the political, institutional unit—the state—and accordingly on the political and military sections.”<sup>15</sup> They distinguish this from “societal security,” which is closely related to but distinct from political security.

For securitization to take place, the audience or constituency must accept the political presentation of something as a threat to a particular object.<sup>16</sup> In other words, political discourse is not sufficient, though it is a necessary move toward securitization. As Richards notes, security is a constructed concept for any given state at any given time, and various political factors and the media will play a role in defining the issues highlighted as security concerns.<sup>17</sup> Then, the “facilitating conditions” that will contribute to the success of a securitizing move include the position of the person communicating the matter and the degree to which the particular threat has historical resonance.<sup>18</sup>

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12. See BARRY BUZAN, OLE WÆVER, & JAAP DE WILDE, *SECURITY: A NEW FRAMEWORK FOR ANALYSIS* (1998); BARRY BUZAN, *PEOPLE, STATES & FEAR: AN AGENDA FOR INTERNATIONAL SECURITY STUDIES IN THE POST-COLD WAR ERA* (1991).

13. Matt McDonald, *Securitization and the Construction of Security*, 14 EUR. J. INT’L REL. 563–87, 567 (2008).

14. BUZAN, *supra* note 12, at 21 and 29.

15. BUZAN ET AL., *supra* note 12, at 119.

16. *Id.* at 25.

17. JULIAN RICHARDS, *A GUIDE TO NATIONAL SECURITY: THREATS, RESPONSES AND STRATEGIES* 14 (2012).

18. Ole Wæver, *The EU as a security actor: Reflections from a pessimistic constructivist on post-sovereign security orders*, in *INTERNATIONAL RELATIONS THEORY AND THE POLITICS*

Although the notion of securitization has been criticized for its focus on speech acts rather than other means of communication,<sup>19</sup> still it remains a valuable means of conceptualizing the characterization of certain situations or states of affairs by numerous national administrations. For instance, immigration is an issue that is often securitized.<sup>20</sup> Politicians depict immigrants and the phenomenon of immigration as threatening in various respects to citizens and the community, and this situation is deemed to warrant emergency measures. Moreover, policy makers and the executive now seem to designate organized crime as an existential threat to the state, thereby securitizing the issue, and claiming a special right to use whatever means necessary to block it.

The political depiction and subsequent public acceptance of organized crime as a security threat is evident in places like the Republic of Ireland, Mexico, and the United States. This has resulted in alterations to legal frameworks and the adoption of more militarized modes of policing.<sup>21</sup> In Ireland, for example, the securitization of organized crime has led to the use and imitation of counterterrorism measures.<sup>22</sup> There, parallels between organized crime and terrorism have long been drawn, and it is perceived that organized crime represents a criminal justice crisis beyond that encountered normally: "Gangland crime constitutes an attack on the State in much the same way as the IRA [Irish Republican Army] attacked the foundations of the State for many years."<sup>23</sup> This claim in the Republic of

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OF EUROPEAN INTEGRATION: POWER, SECURITY AND COMMUNITY 250–94 (Morten Kelstrup & Michael C. Williams eds., 2000).

19. Michael C. Williams, *Words, Images, Enemies: Securitization and International Politics*, 47 INT'L STUD. Q. 511–31 (2003).

20. McDonald, *supra* note 13, at 567.

21. See Luis Astorga & David A. Shirk, *Drug Trafficking Organizations and Counter-Drug Strategies in the U.S.-Mexican Context*, in *Mexico and the United States: Confronting the Twenty-First Century* (USMEX WP 10-01), <http://usmex5.ucsd.edu/assets/024/11632.pdf>; Peter Andreas & Richard Price, *From War Fighting to Crime Fighting: Transforming the American National Security State*, 3 INT'L STUD. REV. 31–52 (2001).

22. See Michael Mulqueen, *Securing the State with Soldier Spies: Evaluating the Risks of Using Military Personnel to Gather Surveillance Evidence in Ireland*, 20 IRISH STUD. INT'L AFF. 121–41 (2009). On the use of counter terrorism measures, see Dermot Walsh, *The Impact of Anti-Subversive Laws on Police Powers and Practices in Ireland*, 62 TEMPLE L. REV. 1099, 1101 (1989); SHANE KILCOMMINS & BARRY VAUGHAN, *TERRORISM, RIGHTS AND THE RULE OF LAW: NEGOTIATING STATE JUSTICE IN IRELAND* 79ff. (2007).

23. 681 DÁIL DEBATES col. 373 (Apr.29, 2009) *per* Peter Power.

Ireland is explained by reference to the rise in drugs and firearms offenses, low detection and prosecution rates for gun homicides in particular,<sup>24</sup> and because of the link between paramilitary actors and a burgeoning “gun culture.”<sup>25</sup> As a result of this conception of the extent and nature of organized crime, in the Republic of Ireland some such suspects are arrested and detained, and trials held, under counterterrorism legislation.<sup>26</sup> Furthermore, unorthodox tactics that once were used against terrorists, such as prolonged detention<sup>27</sup> and asset forfeiture,<sup>28</sup> have been emulated in legislation applying to drugs offenses and a broader range of crime. All of this underlines the significant ramifications the securitization of organized crime has for due process.

### III. ORGANIZED CRIME AS A NATIONAL SECURITY THREAT—THE BRITISH STORY

Jack Straw, as the U.K.’s Shadow Home Secretary, claimed in 1996, “We have not yet reached the situation—I pray that we never will—where organized crime is a threat to our national security.”<sup>29</sup> Political understanding and discourse in the United Kingdom have changed somewhat since then. Organized crime no longer is deemed to harm individual well-being and security only—it is regarded as posing harm to communities<sup>30</sup> and the economy.<sup>31</sup> Overall the link between organized crime and national security is gaining political traction in the United Kingdom.<sup>32</sup> A Home Office

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24. See Liz Campbell, *Responding to Gun Crime in Ireland*, 50 BRIT. J. CRIMINOLOGY 414–34 (2010).

25. See 667 DÁIL DEBATES col. 539 (Nov. 18, 2008); 677 DÁIL DEBATES col. 724 (Mar. 11, 2009); 603 DÁIL DEBATES col. 1171 (June 2, 2005); CIARAN MCCULLAGH, *CRIME IN IRELAND* 37 (1996).

26. Offence Against the State Act 1939 (Republic of Ireland).

27. See Criminal Justice (Drug Trafficking) Act 1997 (Republic of Ireland).

28. See Proceeds of Crime Act 1996 (Republic of Ireland).

29. 271 HANSARD DEBATES, H.C. (Feb. 14, 1996): col. 1070, Mr. Straw.

30. Home Office, *One Step Ahead: A 21st Century Strategy to Defeat Organised Crime* 9 (Cm 6167) (2004).

31. Serious Organised Crime Agency, *Annual Plan 2012/13*, 8.

32. In the U.S. context, see National Security Council, *Strategy to Combat Transnational Organized Crime: Addressing Converging Threats to National Security* (July 2011). Similar comparisons are drawn in Australia; see Mark Findlay, *Organised Crime as Terrorism*, 58 AUSTRALIAN Q. 286–96 (1996).



White Paper in 2004 explicitly drew a connection between organized crime and terrorism, speaking of the need for equivalent reactions:

Organised crime groups share many characteristics with terrorists, including tight knit structures and the preparedness to use ruthless measures to achieve their objectives. . . . A successful approach to organised crime is therefore inseparable from our wider effort against threats to national security.<sup>33</sup>

More recently, organized crime has been described in the U.K. Parliament as a question of national security<sup>34</sup>; the threat facing the United Kingdom from terrorism, hostile action by other states *and organized crime* has been stressed,<sup>35</sup> as has the importance of confidential intelligence sharing on matters of national security against organized crime.<sup>36</sup>

Furthermore, dealing with organized crime as a national security threat is an electoral priority: the *Conservative Manifesto 2010* refers to the re-focusing of the Serious Organised Crime Agency (SOCA) to “enhance national security . . . and crack down on the trafficking of people, weapons and drugs”<sup>37</sup>; the Liberal Democrats spoke of the emergence of “[n]ew security threats . . . whilst terrorists and organised criminals exploit international networks”<sup>38</sup>; and Labour assessed the threat from “Terrorism and organised crime.”<sup>39</sup> All of this indicates the political purchase of such a view.

In terms of executive description, transnational organized crime was deemed to be a key security challenge in the U.K.’s *National Security Strategy* of 2008.<sup>40</sup> This document presented (in rather convoluted terms) the threat of serious and organized crime as “high and causing significant

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33. Home Office, *One Step Ahead*, *supra* note 30, at 1.

34. Written Ministerial Statements, 13 July 2009: Column 2WS, Home Department, Serious Organised Crime Strategy per the Parliamentary Under-Secretary of State for the Home Department (Mr. Alan Campbell).

35. 741 HANSARD DEBATES, H.L. (Nov. 29, 2012): col. WS27, National Security Strategy and Strategic Defence and Security Review Statement, The Chancellor of the Duchy of Lancaster (Lord Strathclyde).

36. 557 HANSARD DEBATES, H.C., (Jan. 28, 2013), col. 537W, *per* Jeremy Browne.

37. *The Conservative manifesto 2010: Invitation to join the government of Britain*, 57.

38. *Liberal Democrat manifesto 2010*, 57.

39. *The Labour party manifesto 2010: A Future Fair for All*, 5:5.

40. Cabinet Office, *The National Security Strategy of the United Kingdom: Security in an interdependent world* 13 (Cm 7291) (2008).

damage to the United Kingdom,” yet “not the pervasive threat which it is in some parts of the world,” “[h]owever, even in the United Kingdom it is a serious and fast-moving threat.”<sup>41</sup> Notably, the most recent National Security Strategy of 2010 does not have a separate section on transnational organized crime as in the 2008 document.<sup>42</sup> Nonetheless it speaks of organized crime as one of a number of “significant transnational threats that require our attention” and as “affect[ing] our interests and the lives of our people at home and abroad.”<sup>43</sup> The National Security Council considers “a significant increase in the level of organised crime affecting the UK” to be in “tier two” of risks facing the United Kingdom (with tier one being the highest), bearing in mind both likelihood and impact.<sup>44</sup> The observation in the National Security Strategy that organized crime is one of the “greatest threats” to national security was cited by the Home Office in 2011,<sup>45</sup> and reiterated in Parliament by the Home Secretary.<sup>46</sup> So this rhetoric reaches across different political parties and branches of government.

#### IV. A MATTER OF DEFINITION

The first argument presented in opposition to this characterization of organized crime is a definitional one. It is suggested that the nebulous nature of both “organized crime” and “national security” means that comparing the two is not meaningful analytically. Though reference is made to the British situation specifically, this conceptual argument is applicable in a broader context.

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41. *Id.* at 13. For critique, see Michael Woodiwiss & Richard Hobbs, *Organized evil and the Atlantic alliance: Moral panics and the rhetoric of organized crime policing in America and Britain*, 49 BRIT. J. CRIMINOLOGY 106–28, 123 (2009).

42. Cabinet Office, *A Strong Britain in an Age of Uncertainty: The National Security Strategy* (Cm 7953) (2010).

43. *Id.* at 14.

44. *Id.* at 27.

45. Home Office, *A Plan for the Creation of a National Crime-Fighting Capability* 4 (Cm 8097) (2011).

46. 529 HANSARD DEBATES, H.C. (June 8, 2011), col. 232, per the Secretary of State for the Home Department (Mrs. Theresa May).

## A. Organized Crime

Despite its popular use, there is no “agreed-upon” definition of organized crime,<sup>47</sup> and many variants have been proposed in the academic, legal, and political spheres. Organized crime may mean structures, networks, or organizations that are involved in criminality; the provision of illegal goods or services; or certain types of crimes of a given level of gravity.<sup>48</sup> In other words, the term may embrace both the “who” and the “what.”<sup>49</sup> A dominant global understanding of organized crime developed from Cressey’s work on the Mafia in the United States in the mid-twentieth century,<sup>50</sup> which identified and categorized strict command structures and hierarchies, unified norms, and a collective identity.<sup>51</sup> However, this socially constructed image<sup>52</sup> is not borne out in empirical studies, either of Mafia groups or of criminal activities in other Western countries, which are carried out by “often ephemeral enterprises.”<sup>53</sup> On this basis, there is now a shift in academic focus toward the illegality of the activities or enterprise undertaken, in addition to the nature and structure of the group responsible.<sup>54</sup>

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47. Petrus van Duyne, *The Phantom and Threat of Organized Crime*, 24 CRIME, L. & SOC. CHANGE 341, 343 (1996). Also see Federico Varese, *What is Organized Crime?*, in ORGANIZED CRIME: CRITICAL CONCEPTS IN CRIMINOLOGY 1–33 (F. Varese ed., 2010); Frank E. Hagan, *The Organized Crime Continuum: A Further Specification of a New Conceptual Model*, 8 CRIM. JUST. REV. 52 (1983); and Frank E. Hagan, “Organized Crime” and “organized crime”: *Indeterminate Problems of Definition*, 9 TRENDS IN ORGANIZED CRIME 127 (2006).

48. Letizia Paoli & Cyrille Fijnaut, *Organised Crime and Its Control Policies*, 14 EUR. J. CRIME, CRIM. L. & CRIM. JUST. 307, 308 (2006); Neil Hamilton-Smith & Simon Mackenzie, *The geometry of shadows: A critical review of organised crime risk assessments*, 20 POLICING & SOC. 257, 261 (2010).

49. Michael Woodiwiss, *Organized Crime—The Dumbing of Discourse*, in 3 BRITISH CRIMINOLOGY CONFERENCE: SELECTED PROCEEDINGS 3–4 (Liverpool, July 1999).

50. DONALD CRESSEY, *THEFT OF THE NATION: THE STRUCTURE AND OPERATIONS OF ORGANIZED CRIME IN AMERICA* 72 (1969). Also see H. ABADINSKY, ORGANIZED CRIME 3 (9th ed. 2010).

51. See LETIZIA PAOLI, *MAFIA BROTHERHOODS: ORGANIZED CRIME, ITALIAN STYLE* 4, 21, 220 (2003).

52. See Mike Levi, *The Organization of Serious Crimes for Gain*, in THE OXFORD HANDBOOK OF CRIMINOLOGY 595–622 (Mike Maguire, Rod Morgan, & Robert Reiner eds., 5th ed., 2012).

53. PAOLI, *supra* note 51, at 224; Dick Hobbs, *Going Down the Glocal: The Local Context of Organised Crime*, 37 HOWARD J. CRIM. JUST. 407, 415 (1998).

54. ALAN BLOCK & WILLIAM CHAMBLISS, ORGANIZING CRIME 13 (1981); JOSEPH ALBINI, *THE AMERICAN MAFIA: GENESIS OF A LEGEND* (1971); Albert K. Cohen, *The*

Whether organized crime is interpreted in a structural or substantive way, it appears to be motivated by the accumulation of wealth. Though the evasion or neutering of state control and the corruption of officials may assist in the criminal enterprise, the generation of profit and the control of illicit markets is the primary focus for organized crime rather than any grasping of power for political ends.<sup>55</sup> Thus, the replacement or usurpation of the government and governance of a geographical area is not a central identifying or necessary feature.

The absence of ideology as such distinguishes organized crime from terrorist groups and activities.<sup>56</sup> Though the definition of terrorism is elusive also, it centers on violence motivated by political, ideological, or philosophical considerations, aimed at civilians to generate fear and cause damage and to coerce a government to act in a particular manner.<sup>57</sup> Critically for present purposes, this distinction between organized crime and terrorism is becoming less clear in real terms, and sometimes there is a nexus in terms of the personnel involved: organized crime groups may supply illegal arms to terrorist groups, and terrorists may seek to generate funds through the sale of illegal goods and services. “Narco-terrorism” is becoming more prevalent globally and ranges from facilitation of trafficking through corruption of officials to involvement in the actual trafficking itself.<sup>58</sup> Moreover, groups may develop into hybrid entities that involve both dimensions of organized crime and terrorism, or may involve the transformation from one to the other.<sup>59</sup> For example, a link between terrorist organizations and organized crime in Northern Ireland has been

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*Concept of Criminal Organisation*, 17 BRIT. J. CRIMINOLOGY 97, 98 (1977); Michael Maltz, *On Defining “Organized Crime”: The Development of a Definition and a Typology*, 22 CRIME & DELINQUENCY 338 (1976). Also see FRANK E. HAGAN, CRIME TYPES AND CRIMINALS 300 (2010); James O. Finckenauer, *Problems of Definition: What is Organized Crime?*, 8 TRENDS IN ORGANIZED CRIME 63, 81 (2005).

55. See Philip Gounev & Tihomir Bezlov, *Examining the Links Between Organised Crime and Corruption* (European Commission, 2010).

56. Finckenauer, *supra* note 54, at 65.

57. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 167 (2nd ed. 2008).

58. ABADINSKY, *supra* note 50, at 6; Tamara Makarenko, *The Crime-Terror Continuum: Tracing the Interplay between Transnational Organised Crime and Terrorism*, 6 GLOBAL CRIME 129–45 (2004).

59. Louise Shelley, John Picarelli, et al., *Methods and Motives: Exploring Links between Transnational Organized Crime & International Terrorism* (U.S. Department of Justice, No. 211207, Sept. 2005).

identified,<sup>60</sup> with persons previously involved in terrorism now using local and international networks to advance their criminal aims. Former subversives are seen to become involved in armed robbery for personal gain, as “criminal entrepreneurs”<sup>61</sup> who will engage in any activity if the potential profit is sufficiently high; their knowledge about weaponry may be disseminated to other criminal groups, or they may be involved in the supply of weapons.<sup>62</sup> Undoubtedly the line between organized crime and terrorism often is unclear.

No statutory definition of organized crime exists in the United Kingdom.<sup>63</sup> Rather, the Home Office states:

Organised crime involves individuals, normally working with others, with the capacity and capability to commit serious crime on a continuing basis, which includes elements of planning, control and coordination, and benefits those involved. The motivation is often, but not always, financial gain.<sup>64</sup>

Thus, organized crime in this context refers to people (the “who”), although they need to be involved in certain types of acts (the “what”). The Home Office concedes that a “spectrum of organisation” exists for criminal groups and that “no clear cut-off point” exists for determining whether any group should be categorized as being involved in organized crime.<sup>65</sup> Furthermore, it acknowledges that many organized criminal groups are loose networks of criminals who come together for the duration of a particular criminal activity.<sup>66</sup> This underlines the nebulous definition

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60. An Garda Síochána & Police Service of Northern Ireland, *A Cross Border Organised Crime Assessment* 2008, 6 (Northern Ireland Office and Department of Justice, 2008); Organised Crime Task Force, *2011 Annual Report & Threat Assessment Organised Crime in Northern Ireland* 16 (Northern Ireland Office, 2011).

61. Select Committee on Northern Ireland Affairs, *Eighth Report: The Illegal Drugs Trade and Drug Culture in Northern Ireland* ¶ 64 (2003).

62. Select Committee on Northern Ireland Affairs, *Organised Crime in Northern Ireland*, ch. 2, ¶¶ 11–23 (2006); Select Committee, *supra* note 61, at ¶ 65.

63. “Serious organised crime” is defined in the Criminal Justice and Licensing (Scotland) Act 2010 (Scotland) as crime involving two or more persons acting together for the principal purpose of committing or conspiring to commit a serious offense or a series of such.

64. Home Office, *Local to Global: Reducing the Risk from Organised Crime* 5 (2011).

65. Home Office, *One Step Ahead*, *supra* note 30, at ¶ 1.1.

66. Home Office, *Extending Our Reach: A Comprehensive Approach to Tackling Serious Organised Crime* 7 (2009).

of organized crime, explaining the reluctance on the part of the Westminster Parliament to legislate in this respect.

There is no mention in any of these academic and policy definitions of jurisdictional matters, which may prove critical in ascertaining whether national security indeed is or is likely to be threatened. Organized crime often is a cross-border phenomenon<sup>67</sup>; the importation of controlled goods by definition is so, and organized crime groups often exploit national differences in laws, regulations, and taxes to establish illegal markets and generate profits. This international dimension permits some criminal groups to increase the range and depth of their activities, and also necessitates cross-border cooperation by investigating and prosecuting authorities. Nonetheless, organized crime also may be entirely or predominantly national or local in nature.<sup>68</sup>

“Transnational” organized crime is the term most often used to describe organized crime with cross-border dimensions. Mueller spoke of “transnational crime” as criminal phenomena that transcend international borders, transgress the laws of several states, or have an impact on another country<sup>69</sup>; transnational crime usually is organized, but not necessarily so. The concept of transnational organized crime emerged “from relative obscurity” in the 1990s, and soon was described dramatically by the Secretary General of the United Nations as involving the “forces of darkness.”<sup>70</sup> Though no formal definition exists in the United Kingdom, the U.N. Convention against Transnational Organised Crime (which the United Kingdom has signed and ratified) deems an offense to be transnational in nature if committed in more than one state; if it is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state; if it is committed in one state but involves an organized criminal group that engages in criminal activities in more than one state; or if it is committed in one state but has substantial effects in another.<sup>71</sup>

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67. PETRUS VAN DUYN, *ORGANIZED CRIME IN EUROPE* (1996).

68. See Hobbs, *supra* note 53.

69. Gerhard Mueller, *Transnational Crime: Definitions and Concepts*, in *COMBATING TRANSNATIONAL CRIME: CONCEPTS, ACTIVITIES, AND RESPONSES* 13 (Phil Williams & Dimitri Vlassis eds., 2001) 13.

70. Boutros-Ghali, Boutros, *Transnational crime: the market and the rule of law* (Transcript, Dec. 15, 1994).

71. U.N. Convention against Transnational Organised Crime, Article 3(2), G.A. Res. 55/25, U.N. Doc. A/Res/55/25 (Nov. 10, 2000).

The boundary between organized crime and transnational organized crime is a porous one. Criticism has been made of the use of the latter term as mere shorthand for organized crime groups with an international dimension, which is regarded as different from being truly transnational in terms of structure and operation. To this end, Wright distinguishes between international and transnational organized crime, where the latter concerns major crime groups centered in no single location but with operations in many, whereas the former merely involves acts that extend across a national border.<sup>72</sup> As well as vagueness in the concept of transnational organized crime itself, it of course inherits the ambiguity in organized crime outlined above. Moreover, transnational organized crime is seen by some as a politicized concept,<sup>73</sup> given its dominant characterization as an external threat, with the infiltration of a legitimate domestic sphere by outsiders.<sup>74</sup> Overall, this leads to transnational organized crime remaining a contested criminological matter, rather than a juridical or legal term.

## B. National Security

As has been outlined, the concepts of organized crime and its transnational counterpart are hard to delineate. The notion of national security is no less problematic, and the description of organized crime as a threat to this is facilitated by the extension of the latter.

National security, insofar as it denotes the existence and survival of the state, was once understood primarily in a military sense, and any threats were seen as deriving from other nations. Such an understanding was predicated on the Weberian conception of the state, with political institutions that are constituted and authorized to govern a given area, and with the retention of a monopoly on the use of force in this territory.<sup>75</sup> Encroachments on state sovereignty, through military force or espionage, constituted attacks on national security.

The ambiguity of the concept of national security and its potential to cause confusion has long been recognized.<sup>76</sup> Richards described national

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72. ALAN WRIGHT, *ORGANISED CRIME* 23–24 (2006).

73. Edwards & Gill, *supra* note 5.

74. *Id.* at 252–53.

75. Max Weber, *Politics as a Vocation*, in *FROM MAX WEBER: ESSAYS IN SOCIOLOGY* 78 (Hans H. Gerth & C. Wright Mills eds. & trans., 1946) (1919).

76. Arnold Wolfers, “National Security” as an ambiguous symbol, 67 *POL. SCI. Q.* 481, 483 (1952).

security as “a particular articulation of security priorities and concerns put forward by the political leaders of a state, at a given time in its history.”<sup>77</sup> So it is a malleable and contingent notion. Indeed, later in the twentieth century, national security was expanded from a strictly military concept to a much broader one,<sup>78</sup> incorporating political, economic, societal, and ecological dimensions.<sup>79</sup> As Ullman claimed, “Defining national security merely (or even primarily) in military terms conveys a profoundly false image of reality.”<sup>80</sup> So threats to political systems, to the environment, and to public health, for example, are viewed increasingly as falling within the rubric of national security. Such extension may be positive, insofar as it underlines the significance of certain communal human interests, and the gravity and significance of their erosion. Strictly speaking, however, such interests concern human rather than national security.<sup>81</sup> Moreover, not all states share a “democratic conception” of national security,<sup>82</sup> and its focus often remains on the state comprising its institutions rather than on the nation of people. Moreover, its breadth and vagueness may be problematic. This “amorphous, open-ended concept” is claimed to be “amenable to legal and political manipulation,”<sup>83</sup> and new interpretations have been criticized for lacking clear boundaries and definitional parameters.<sup>84</sup> Now, in the “new security context”<sup>85</sup> various challenges are identified as threats, though there is no international conflict or war as such. The core issue is that anything of significant political concern can be (re-)defined as a national security issue, given the loose nature of the term. This is worrisome because of the consequences that arise, as will be explored more fully later.

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77. RICHARDS, *supra* note 17, at 17.

78. See BUZAN, *supra* note 12, at 16–23.

79. See BUZAN ET AL., *supra* note 12, at 21–29.

80. Richard H. Ullman, *Redefining Security*, 8 INT’L SECURITY 129 (1983).

81. HUMAN SECURITY AND THE NEW DIPLOMACY: PROTECTING PEOPLE, PROMOTING PEACE (Rob McRae & Don Hubert eds., 2001); THE UNITED NATIONS AND HUMAN SECURITY (Edward Newman & Oliver P. Richmond eds., 2001); NEIL MACFARLANE, HUMAN SECURITY AND THE UN: A CRITICAL HISTORY (2006).

82. LAURENCE LUSTGARTEN IAN LEIGH, IN FROM THE COLD: NATIONAL SECURITY AND PARLIAMENTARY DEMOCRACY, ch. 1 (1994).

83. FIONNUALA NÍ AOLÁIN, LAW IN TIMES OF CRISIS 215 (2006).

84. See, e.g., Daniel Deudney, *The Case Against Linking Environmental Degradation and National Security*, 19 MILLENNIUM: J. INT’L STUD. 461–76 (1990).

85. ANDREAS & NADELMANN, *supra* note 4, at 190.



### C. Organized Crime as a National Security Threat

As outlined, organized crime now is regarded politically as different from “ordinary crime,” on the understanding that it compromises the state as an entity, rather than simply involving the victimization of individuals. Moreover, the perception is that transnational organized crime can corrupt governance abroad, thereby threatening international stability with ramifications for national security. Such understandings are commonplace globally. Nonetheless, the particular British political and executive statements outlined above do not define the key terms involved, nor do they explain always the reasoning behind this comparison. So it is unclear whether organized crime is deemed to be a national security threat through its challenge to the existence of the/a state and its institutions, or through the gravity and extent of the threat it poses to the populace and to the conducting of “normal life.”

Regardless of the jurisdiction, transnational organized crime may be called a “hard” threat insofar as it portends or involves paramilitary action, or a “softer” threat, which may impact on the stability of the political process and the economy. At one end of the spectrum, organized crime has been equated to terrorism and thus threatens national security as a matter of definition. Here national security is construed in the traditional military sense, and organized crime is seen as generating alternative armed forces that seek to subvert and replace the arms of the states. For example, as is the case in Mexico, members of organized crime groups may have been trained militarily,<sup>86</sup> or may be part of or have corrupted the state’s intelligence agencies. More broadly, organized crime may be conceived as threatening national security through a variety of means: the co-option and corruption of officials and official structures, the flouting of the rule of law through impunity, the cultivation of illegal economies, the gravity and nature of the harms perpetrated, and the overspill of violence into civil society.

Certainly, transnational organized crime is akin to terrorism insofar as there is often a transnational dimension to many terrorist groups, as many require foreign support and financing. Moreover, as noted above, drug trafficking and other quintessential organized crimes may fund terrorism, and some hybrid groups incorporate elements of both.<sup>87</sup> So, it may be

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86. See Astorga & Shirk, *supra* note 21, at 49–50. Also see VANDA FELBAB-BROWN, CALDERÓN’S CALDRON: LESSONS FROM MEXICO’S BATTLE AGAINST ORGANIZED CRIME AND DRUG TRAFFICKING IN TIJUANA, CIUDAD JUÁREZ, AND MICHOACÁN (2011).

87. See *supra* text accompanying note 58.

contended that transnational organized crime is securitized legitimately, given that political discourse and popular acceptance is based on a real threat to the state. Nevertheless, organized crime and transnational organized crime appear to be different only in degree, rather than in kind. Whereas transnational organized crime may have more of an empirical “fit” with terrorism, it remains more closely connected to “standard” domestic cases of organized crime. Different modes of policing may be required to deal with transnational organized crime when compared to “local” organized crime; having said that, they have more in common with each other than either does with terrorism, and the kinds of emergency and potential harms presented by (transnational) organized crime remain different to terrorism. This suggests that, conceptually, organized crime, be it domestic or trans-/international, is distinct from traditional threats to national security. Moreover, given the fluidity of both concepts, it is questionable whether this comparison is any more than political rhetoric.

## V. THE EMPIRICAL QUESTION

Secondly, in an empirical sense, it will be argued that at present domestic organized crime groups in the United Kingdom cannot pose a threat to national security, as they are too ephemeral in structure and transient in form. Moreover, it is not clear whether transnational organized crime poses such a threat. Though this argument centers on the present state of affairs in the United Kingdom, some of the observations may be translated to other contexts.

Much of what is conceived of as organized crime in the United Kingdom is in fact “disorganized”<sup>88</sup> or comprises groups assembled on a relatively short-term basis for specific projects from a broader pool of professional criminals in a particular region.<sup>89</sup> As Levi notes, highly organized crime is unlikely to flourish where it is hard to develop corrupt alliances between criminal justice officials, politicians, and suppliers of illegal commodities.<sup>90</sup> At present, organized crime does not exercise a systematic influence over the

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88. See PETER REUTER, *DISORGANIZED CRIME: THE ECONOMICS OF THE VISIBLE HAND* (1983).

89. Levi, *supra* note 52, 604.

90. Mike Levi, *Policing fraud and organised crime*, in *HANDBOOK OF POLICING* 522 (Tim Newburn ed., 2nd ed. 2008).

political system in Great Britain.<sup>91</sup> In contrast, there is evidence that Mafia groups in Italy and the United States, for example, replaced some activities of state institutions,<sup>92</sup> carrying out “social functions” in addition to their central “entrepreneurial acts.”<sup>93</sup> Of course, such an alternative mode of governance usually is predicated on violence and intimidation rather than any democratic mandate or consent, and so its harm is undeniable. Nonetheless, these quasi-governmental actions may legitimize such groups in the eyes of some of the population.<sup>94</sup> There is little evidence of this type of organized crime in the United Kingdom, of organized criminals controlling elections, or of political alliances protecting such actors.

Furthermore, there is no evidence in the United Kingdom of the systematic intimidation or corruption of the judiciary or the prosecution, such as that crippled the attempt to address organized crime in parts of the United States in the early twentieth century.<sup>95</sup> Nevertheless, Europol indicates that criminal groups may stymie the administration of justice in the United Kingdom through witness intimidation,<sup>96</sup> and there is some limited evidence of juror corruption.<sup>97</sup> In addition, organized crime impacts the U.K.’s economy, with estimated costs of between £20 and £40 billion a year.<sup>98</sup> It also has been found to corrupt local business structures.<sup>99</sup> Whether this suffices to constitute a national security threat is another matter.

Scepticism about the challenge that domestic organized crime poses currently for national security in a given jurisdiction is not to be unduly sanguine about the situation, nor to reject the possibility of a change in future. It is not inconceivable that organized crime could, one day, reach a level and extent as to undermine public agencies and processes in the United Kingdom, and the confidence expressed here in the current state of

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91. Paoli & Fijnaut, *supra* note 48, at 312.

92. See JOHN LANDESCO, *ORGANIZED CRIME IN CHICAGO*, ch. VIII (1968).

93. Klaus von Lampe, *Organised Crime in Europe: Conceptions and Realities*, 2 POLICING: J. POL’Y & PRAC. 7–17 (2008).

94. Ronald Goldstock, *Organised Crime in Northern Ireland: A Report For The Secretary Of State* 6 (Northern Ireland Office, 2004); PAOLI, *supra* note 51, at 212.

95. See LANDESCO, *supra* note 92.

96. Europol, *OCTA 2009: EU Organised Crime Threat Assessment*, at ¶ 5.6 (2009).

97. Gounev & Bezlov, *supra* note 55, at 106.

98. Home Office, *A Plan for the Creation*, *supra* note 45, at ¶ 2.4.

99. *OCTA 2009*, *supra* note 96.

public bodies does not guarantee that they are impermeable to corruption. But for now, the level of criminality and the resilience of public institutions suggests otherwise. Moreover, this understanding does not preclude belief in the effect of heated rhetoric on policy development, and so suggests that restraint should be exercised in drawing such a comparison.

To be fair, most policy documents in the United Kingdom that present organized crime as a national security threat presumably are speaking of transnational organized crime (even if this is not the precise term used), or at least are referring to organized crime overseas.<sup>100</sup> Thus, the corruption of other countries' political structures, judicial systems, and economies is regarded as a phenomenon that threatens U.K. national security. Poor governance, ethnic separatism, and traditions of criminal activity can support crime-terror interactions in different global settings,<sup>101</sup> and organized crime may co-opt or "capture" the state and its institutions if they are weak or in transition.<sup>102</sup> Of course, intention to subvert the state on the part of criminal groups is not necessary for it to constitute a national security threat. For example, transnational organized crime, through the construction of illegal economies in an otherwise legitimate system, may be seen as threatening the national security of the United Kingdom, given that the generation of profits can rival GDP.<sup>103</sup> Moreover, in some countries, the narcotics trade provides a majority or very significant proportion of the revenue, and corruption and direct state involvement is commonplace.<sup>104</sup>

Empirically, it is a matter of judgment and debate whether or not organized crime constitutes a national security threat, especially given the

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100. However, the Government has noted that the National Security Council needs to increase its focus on domestic security issues, including organized crime. This may be interpreted as suggesting that domestic organized crime also is regarded as a national security threat. Joint Committee on the National Security Strategy, *Planning for the next National Security Strategy: Comments on the Government response to the Committee's First Report of Session 2010–12*, First Report of Session 2012–13, HL Paper 27 HC 423, at 15–16 (2012), <http://www.publications.parliament.uk/pa/jt201213/jtselect/jtnatsec/27/27.pdf>.

101. Shelley et al., *supra* note 59.

102. Phil Williams & Doug Brooks, *Captured, criminal and contested states: Organised crime and Africa in the 21st century*, 6 S. AFR. J. INT'L AFF. 81–99 (1999); Edgardo Buscaglia & Jan van Dijk, *Controlling Organized Crime and Corruption in the Public Sector*, 3F. ON CRIME & SOC'Y 3–34, 8 (2003).

103. UNODC, *supra* note 11, at 13.

104. Niklas Swannstrom, *The Narcotics Trade: A Threat to Security? National and Transnational Implication*, 8 GLOBAL CRIME 1–25, 4 (2007).

definitional ambiguities involved. The United Nations Office on Drugs and Crime stated that a clear sign that crime has become a national security threat is when exceptional legal and security measures are taken, including calling on the military to help re-establish the government's authority.<sup>105</sup> This seems to put the cart before the horse, so to speak, in stating that the reaction of the state defines the nature and extent of the problem. Bailey, referring to the situation in Mexico, speaks of a tipping point whereby a "chronic but tolerable problem of public security . . . become[s] a genuine threat to national security and democratic governance."<sup>106</sup> The critical question is what is this critical juncture where may it be said that a really serious social problem becomes one warranting extreme or extraordinary measures.

Organized crime may indeed infiltrate and corrupt state institutions, such as has occurred at times in Mexico and Italy, for example. It may attain sufficient power as to influence the executive unduly and to undermine the integrity of the judicial process. Alternatively, it might come to exercise sovereignty and usurp state functions in some contexts. If so, then there may be a justification for at least treating the relevant organizations as a national security threat on an *ad hoc* basis. The present situation in the United Kingdom, however, falls short of this.

## VI. DUE PROCESS

The tension between liberty and security, which has been expertly rehearsed and analyzed elsewhere,<sup>107</sup> is especially pronounced when individual rights meet and clash with the imperative of national security. This final argument suggests that describing organized crime as a national security threat has implications for due process rights in different dimensions, and so should be resisted to the greatest extent possible. Again, although

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105. United Nations Office on Drugs and Crime, *The Globalization of Crime: A Transnational Organized Crime Threat Assessment II* (2010).

106. John Bailey, *Combating Organized Crime and Drug Trafficking in Mexico: What are Mexican and U.S. Strategies? Are They Working?*, in *SHARED RESPONSIBILITY: U.S.-MEXICO POLICY OPTIONS FOR CONFRONTING ORGANIZED CRIME* 327 (Eric L. Olson, Andrew Selee, & David Shirk eds., 2010).

107. See, e.g., LUCIA ZEDNER, *SECURITY* (2009), and CONOR GEARTY, *LIBERTY AND SECURITY* (2013).

the U.K. situation and British law remain the primary focus, the arguments made here are of more general application. Firstly, treating organized crime as a national security threat may have two competing effects in terms of law creation: although it could detract political attention from the use and application of extant domestic law, it is more likely that it would generate a moral panic, thereby contributing to enactment of more repressive legislation. Then, as regards the application of extant rules of criminal procedure, such assessments may preclude prosecution, limit the material disclosed at trial, or lead to closed hearings. The ultimate legal consequence would be a declaration of a state of emergency by the executive, and associated derogation from certain rights. Critically, the relocation of a crime problem in the security realm has the potential to affect the ability of the courts to intervene in monitoring practices that are problematic in terms of procedural rights.

Before addressing these three points, it is worth noting the general significance of national security in the legal or judicial sense. Though national security is not defined precisely in U.K. law, it has been described as constituting a source of power for the executive: a description of state interest or reason for action, and an exemption from certain rules.<sup>108</sup> For example, despite the absence of definition, national security is a justification for intrusive surveillance, under Section 32 of the Regulation of Investigatory Powers Act 2000. The Secretary of State or senior authorizing officer may also permit surveillance if he believes that it is necessary in the interests of the economic well-being of the United Kingdom or to prevent or detect serious crime. National security exemptions may also be found in the Freedom of Information Act 2000 and the Data Protection Act 1998.

Furthermore, national security is an approved ground for limiting rights under the European Convention on Human Rights (ECHR) and is referred to explicitly in various articles. Indeed, many other human rights instruments permit rights to be limited on the ground of national security, such as the American Convention on Human Rights and the International Convention on Civil and Political Rights. This concept is not defined in the ECHR; as the European Commission on Human Rights stressed in *Esbester v. The United Kingdom*, the term “national security” is not amenable to exhaustive definition.<sup>109</sup> Nevertheless, Cameron notes that it cannot be the

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108. LUSTGARTEN & LEIGH, *supra* note 82, at 321.

109. *Esbester v. The United Kingdom* (1994) 18 Eur. H.R. Rep. CD 72.

same as public safety, public order, or territorial integrity, given that these concepts as well as national security are mentioned in the aforementioned ECHR articles.<sup>110</sup> So, though there may be a degree of overlap, the notion is distinct from these cognate ideas in the European context.<sup>111</sup>

The imperatives of national security may require states to take certain actions, such as collecting and storing information on persons for use when assessing their eligibility for posts of importance for national security, and the European Court of Human Rights (ECtHR) permits this, as long as there exist adequate and effective guarantees against abuse.<sup>112</sup> The ECtHR holds the margin of appreciation (that is, the latitude granted to national authorities in fulfilling their duties under the ECHR<sup>113</sup>) to be wide when assessing the requirements of and means of pursuing interests of national security.<sup>114</sup> Moreover, ECHR case law indicates that espionage and terrorism, for example, are national security threats.<sup>115</sup> This maps onto the more traditional interpretations of the concept. There has yet to be a case centering on organized crime as a discrete national security threat.

#### A. The Creation of Law

Firstly, thinking about and describing organized crime as a matter of national security has the potential to affect the appraisal and creation of policy and law. Of course, this claim is arguable in all jurisdictions. On the one hand, it could relocate political attention from the need for domestic measures; alternatively, it could ratchet up the severity of the likely legal reactions. So, this shift in focus has both positive and negative consequences.

Though organized crime may be transnational in nature, and though many of the reactions and relevant institutions may be international also, across the world the primary legal responses continue to be domestic ones. This is not without its critics: Swanstrom laments the use of national mechanisms to address international security threats,<sup>116</sup> and similarly

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110. IAIN CAMERON, *NATIONAL SECURITY & THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 54 (2000).

111. *Id.*

112. *Klass v. Germany* (1980) 2 Eur. H.R. Rep. 214, ¶ 50.

113. Steven Greer, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights* (2000).

114. *Leander v. Sweden* [1987] 9 Eur. H.R. Rep. 433, ¶¶ 58–59.

115. *Klass v. Germany* (1980) 2 Eur. H.R. Rep. 214; and see CAMERON, *supra* note 110, at 55.

116. Swanstrom, *supra* note 104, at 6.

Baker identifies problems of using criminal law regulation against transnational organized crime, due to definitional and jurisdictional issues, and difficulties regarding the law of complicity and joint enterprise.<sup>117</sup> Nonetheless, in the United Kingdom and indeed elsewhere, the substantive crimes, the rules of criminal procedure, and the laws governing policing practice remain, to a great extent, domestic.<sup>118</sup> This is not to underestimate the importance of inter-/transnational rules and practices—like measures deriving from the United Nations, the Financial Action Task Force, and the European Union<sup>119</sup>—which steer domestic law but may differ in terms of how prescriptive they are. By and large, the legal responses to organized crime remain entrenched in the traditional paradigm of the sovereign state.

Characterizing organized crime as a national security threat may denote a move toward the government thinking more strategically and preventatively about the issue, not simply assigning blame through the usual means of the criminal process. This is not problematic in itself, and in fact may be more effective, operationally and practically. Conversely, refocusing on the intersection with national security may lead to more institutional and political neglect of domestic tactics, and less critical appraisal of their effectiveness. As Baker notes, the conditions that facilitate organized crime and associated power vacuums need to be addressed,<sup>120</sup> but characterizing organized crime as a security threat and focusing on the transnational dimension in particular allows for abnegation of responsibility for ineffective responses at the local level, such as has occurred in some E.U. accession states.<sup>121</sup> Overall, we could indeed question whether transnational organized crime groups are “semi-intangible phenomena” created specifically to conceal the relative lack of success against organized crime.<sup>122</sup>

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117. Estella Baker, *The Legal Regulation of Transnational Organised Crime: Opportunities and Limitations*, in Edwards & Gill, *supra* note 1, at 184; also see Jens David Ohlin, *Joint Intentions*, in *RETHINKING CRIMINAL LAW THEORY: NEW CANADIAN PERSPECTIVES IN THE PHILOSOPHY OF DOMESTIC, TRANSNATIONAL, AND INTERNATIONAL CRIMINAL LAW* 267–90 (François Tanguay-Renaud & James Stribopoulos eds., 2012).

118. See Hobbs, *supra* note 53.

119. See TOMOYA OBOKATA, *TRANSNATIONAL ORGANISED CRIME IN INTERNATIONAL LAW* (2010).

120. Baker, *supra* note 117.

121. Paddy Rawlinson, *Bad Boys in the Baltic*, in Edwards & Gill, *supra* note 1, at 132.

122. Monica den Boer, *Foreword*, in, *DEFINING AND DEFYING ORGANIZED CRIME: DISCOURSE, PERCEPTIONS AND REALITY*, xvii (Felia Allum, Francesca Longo, Daniela Irrera, & Panos A. Kostakos eds., 2012).



In the United Kingdom, some existing legal measures used to deal with organized criminality are questionable in terms of their application and effectiveness, such as serious crime prevention orders<sup>123</sup> and civil asset recovery.<sup>124</sup> One could argue that reframing the debate to encompass national security will shift political attention even further from the success of measures already introduced. However, it is more likely that references to organized crime as a national security threat will operate in tandem rather than replace domestic reactions, thereby augmenting the range and scope of legal responses.

The second aspect of this concern about the effect on lawmaking is the potential heightening of anxiety and generation of a moral panic. Here the “folk devils”<sup>125</sup> of organized crime are regarded as challenging not only the safety of society but also national security. This rhetoric, be it overblown or otherwise, may elevate the perceived need for robust measures against such criminality domestically.

A range of measures has been introduced dealing with organized crime that is problematic in terms of due process protections, and the process of securitization would contribute to more such legislation. One example is the introduction of statute law governing anonymous witness evidence. The House of Lords had ruled against such a practice in *R v. Davis*<sup>126</sup>; although the reality and extent of witness intimidation was not disputed by the Law Lords,<sup>127</sup> the protective anonymizing measures in this instance were found to have so hampered the defense enough to render the trial unfair and incompatible with Article 6 of the ECHR.<sup>128</sup> This necessitated legislative action to reconstruct a scheme that complied with the Convention, taking the form of the Criminal Evidence (Witness Anonymity) Act 2008. Though *Davis* centered on witness intimidation and the right to

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123. See Serious Crime Act 2007, Pt. I.

124. Proceeds of Crime Act 2002; see Her Majesty's Inspectorate of Court Administration, *Payback Time—Joint Review of Asset Recovery since The Proceeds of Crime Act 2002* (2004); Her Majesty's Inspectorate of Constabulary for Scotland (HMICS) and the Inspectorate of Prosecution in Scotland, *Joint Thematic Report on The Proceeds of Crime Act 2002* (2009).

125. STAN COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS* (1972).

126. *R v. Davis*; *R v. Ellis* [2006] EWCA Crim 1155; [2008] UKHL 36.

127. *Id.* at ¶ 27.

128. *Id.* at ¶¶ 35 and 61.

confrontation, Bingham J. noted that historically concern about “national security and intimidation of witnesses” led to reliance on secret, anonymous evidence, such as in the notorious Court of Star Chamber.<sup>129</sup> National security also was cited further in the debate on the subsequent Bill, where it was noted that in such cases, not even the court will know of the identity of the witness.<sup>130</sup> Though national security was not determinative in eroding the right to confrontation, this demonstrates that at one time such a measure was deemed relevant due to such concerns, and will be at its most potent in those cases.

The danger in the context of organized crime is the conflation by U.K. policymakers of a very serious social issue and a national emergency,<sup>131</sup> thereby increasing the acceptance of once extraordinary measures in a wider setting. Deploying the language of national security in relation to organized crime increases the likelihood of further robust reactions to this form of criminality, and fits with Ashworth’s imagined security model of criminal justice,<sup>132</sup> with the seepage of extraordinary measures into a wider context.

## B. The Application of Law

The second scenario to be considered is where organized crime is treated as a national security threat in specific cases. This involves a shift from discourse to praxis, with reference to prosecution particularly.

It is true that investigations into organized crime and terrorism may involve highly sensitive material that could directly threaten national security.<sup>133</sup> Initially, if a particular case of organized crime is seen as touching on such matters, there is a question of whether a prosecution will be brought at all,<sup>134</sup> if disclosed material could compromise investigative techniques or affect international relations or cooperation in terms of intelligence sharing. Then, if a case involving national security matters proceeds to trial, a special process is adopted. In the United Kingdom, public interest immunity (PII)

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129. *Id.* at ¶ 5.

130. Commons’ Consideration of Lords; amendments, 16 July 2008: col. 368, per the Parliamentary Under-Secretary of State for Justice (Maria Eagle).

131. BARBARA HUDSON, *JUSTICE IN THE RISK SOCIETY: CHALLENGING AND RE-AFFIRMING “JUSTICE” IN LATE MODERNITY* 218 (2003).

132. Andrew Ashworth, *Security, Terrorism and the Value of Human Rights*, in *SECURITY AND HUMAN RIGHTS* 203–26, 218 (Ben Goold & Liora Lazarus, eds., 2007).

133. Crown Prosecution Service, *CPS Disclosure Manual* 9.2–9.3 (2005).

134. LUSTGARTEN & LEIGH, *supra* note 82, at 292.

may be sought. Although generally the prosecution bears a statutory duty to disclose to the defense all relevant evidence and material,<sup>135</sup> PII may be claimed if disclosure could cause real damage to a public interest, such as revealing the existence or nature of surveillance. The Crown Prosecution Service (CPS) may apply to the courts for PII, or a PII certificate may be authorized and signed by a Minister in the case of Government material. The court will then assess whether the concerns prompting the grant of the certificate outweigh the norm of open justice. The type of hearing is determined by the level of sensitivity of the information involved: in type 1 cases, the prosecutor informs the defense of the category of sensitive material, and the defense may make representations at an *inter partes* hearing; in type 2 cases, the defense is informed of the immunity application but not of the category of material, the hearing is *ex parte*, and the defendant is represented by special counsel appointed by the court; and for type 3 cases, the defense is not notified, but his or her interests again are represented by court-appointed special counsel.<sup>136</sup>

PII seeks to balance the tension between the principle of open and fair administration of justice with the nondisclosure of sensitive information that may compromise interests such as national security. This “derogation from the golden rule of full disclosure” must be the minimum necessary to protect the public interest in the effective investigation and prosecution of serious crime and must never threaten the fairness of the trial.<sup>137</sup> This process is compliant with Article 6 of the ECHR, which safeguards the fairness of the criminal trial—as the ECtHR stressed in *Kennedy v. United Kingdom*, the entitlement to disclosure of relevant evidence is not an absolute right.<sup>138</sup>

Though PII remedies concerns about potentially harmful revelations in court and thus may safeguard national security, problematic issues may arise regarding the relation between the defendant and special counsel. Any interaction and communication between them is limited, and once special counsel has viewed the sensitive material, restrictions apply to the instructions he or she may receive. Moreover, the special counsel might not make the best or most effective arguments before the judge, as the special counsel

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135. Criminal Procedure and Investigations Act 1996, as amended by the Criminal Justice Act 2003.

136. *R v. Davis, Johnson and Rowe* [1993] 1 WLR 613.

137. *R v. H and C* [2004] UKHL 3 para 18.

138. *Kennedy v. The United Kingdom* (2011) 52 Eur. H.R. Rep. 4 [187].

might not contest the failure to disclose material that, unknown to the special counsel, could assist the defense. Essentially, the relationship with the defendant lacks the quality of confidence inherent in any ordinary lawyer-client relationship.<sup>139</sup> Nonetheless, the ECtHR in *Kennedy v. The United Kingdom* noted that restrictions on the right to a fully adversarial procedure are permissible in criminal proceedings where this is “strictly necessary in the light of a strong countervailing public interest, such as national security.”<sup>140</sup> Thus, construing organized crime as a national security threat has real implications for the right to an adversarial process.

There are yet more drastic consequences in the context of civil proceedings in the United Kingdom relating to organized crime involving “sensitive material” that would damage national security if disclosed. Part Two of the Justice and Security Act 2013 permits the courts to make a declaration permitting what is called “closed material applications” if sensitive material would be disclosed, or if it would be if not subject to PII, and if it is in the interests of the fair and effective administration of justice.<sup>141</sup> The Secretary of State may not make an application for such a declaration unless he or she has considered whether to make, or advise another person to make, a claim for PII in relation to the particular material.<sup>142</sup> Once this declaration is in place, an application may be made by the person who would need to disclose material so that disclosure would be to the court, the special advocate representing the interests of the excluded individual, and the Secretary of State only.<sup>143</sup>

Though there has been no reference in parliamentary debate to organized crime as justifying such measures, the Serious Organised Crime Agency (SOCA)<sup>144</sup> sees the availability of these closed material procedures as important in the context of such crime, beyond situations where PII is used as the standard mechanism for protecting sensitive material from disclosure.<sup>145</sup>

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139. *R v. H and C*, *supra* note 137, at ¶ 22.

140. *Kennedy v. The United Kingdom*, *supra* note 138, at [184].

141. Justice and Security Act 2013, Part II, § 6.

142. *Id.* at § 6(7).

143. *Id.* at § 6(8).

144. SOCA was replaced by the National Crime Agency in October 2013; see Crime and Courts Act 2013, Schedule 8.

145. SOCA, *Justice and Security Green Paper: SOCA response to consultation*, ¶ 2, [http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/02/66\\_SOCA.pdf](http://consultation.cabinetoffice.gov.uk/justiceandsecurity/wp-content/uploads/2012/02/66_SOCA.pdf)

SOCA noted that activity against organized crime “like against other national security threats” involves sensitive capabilities and techniques,<sup>146</sup> thereby justifying such radical measures. Indeed, this process could apply to civil forfeiture proceedings and to civil actions by police informers, for example. The closed material procedure is deeply problematic, given the circumscription of open justice and the limitation of the adversarial process.

Notwithstanding the contentious issues around open justice and the quality and nature of legal representation in PII and closed hearings, the increasingly common characterization of organized crime as a national security threat in the political sphere will not necessarily lead to any increased prosecution applications for PII. Each case is considered individually, and moreover, challenges to other public interests like policing provide a legitimate basis for PII applications currently. Nonetheless, as is explored further below, the courts demonstrate a marked reluctance to intervene in the context of national security concerns, and so the reliance on the discourse of national security by the applicant for PII may guarantee court approval. In addition, the imperative of combating organized crime lends weight to the enactment of more expansive provisions, such as in the Justice and Security Act 2013.

### C. Derogation from Law

The final potential development is the translation of this rhetoric about organized crime as a national security threat into its treatment as such in a general sense, through the declaration of a state of emergency. As Gross observes, defining an emergency is not easy,<sup>147</sup> and clearly demarcating such a state from normalcy may not always be possible.<sup>148</sup> Nonetheless, the paradigmatic understanding is one of a temporary break from the norm resulting from a particular event or situation.<sup>149</sup> If concern about organized crime ever became so pronounced in the United Kingdom as to move from rhetoric to executive action, a formal declaration could be made under Article 15 of the ECHR, which permits derogation from Convention obligations in time of war or other public emergency threatening the life of

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146. *Id.* at ¶ 1.

147. Oren Gross, *Once more unto the breach*, 23 YALE J. INT’L L. 437 (1998).

148. Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1022 (2003).

149. Gross, *supra* note 147, at 439–40.

the nation, to the extent strictly required by the exigencies of the crisis.<sup>150</sup> Such notices of derogation were made in 1971, 1973, and 1975 by the United Kingdom relating to the political situation in Northern Ireland and the level of paramilitary violence there. In *Ireland v. the United Kingdom*, the parties were agreed, as were the Commission and the Court, that the Article 15 criteria were satisfied in these instances, since terrorism had for a number of years represented “a particularly far-reaching and acute danger for the territorial integrity of the United Kingdom, the institutions of the six counties and the lives of the province’s inhabitants.”<sup>151</sup> Whereas comparisons are drawn between the extent and effect of organized crime and the threat of paramilitary crime in Northern Ireland,<sup>152</sup> in the case of the declarations such derogations were made explicitly and, though controversial, were predicated on a defined and evident problem.

As was argued above, the current level and extent of organized crime in the United Kingdom suggests that such a declaration is highly unlikely to occur, save for a dramatic change in circumstances. Moreover, as Poole notes, emergency powers are now usually statutory rather than exercises of executive power,<sup>153</sup> and this can obscure the distinction between what should be treated as normal and as exceptional.<sup>154</sup> This brings us back to the concern about rhetoric leading to statutory measures that encroach on civil liberties, rather than to executive exercises of the prerogative against organized crime, or reliance on Article 15 of the ECHR to permit derogations from particular rights.

#### D. Judicial Deference

The fundamental concern regarding the treatment of organized crime as a national security threat by the prosecution or the executive is the judicial deference this would involve.<sup>155</sup> As Lord Steyn stated in the House of Lords in *Secretary of State for the Home Department v. Rehman*, what is

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150. See *A v. The United Kingdom* (2009) 49 Eur. H.R. Rep. 29 ¶ 173ff.

151. *Ireland v. The United Kingdom* (1979–80) Eur. H.R. Rep. 25.

152. See Organised Crime Task Force, *supra* note 60, at 16; An Garda Síochána, *supra* note 60, at 6.

153. Thomas Poole, *Constitutional exceptionism and the common law*, INT’L J. CONST. L. 247, 253 (2009).

154. *Id.* at 257.

155. See Adam Tomkins, *National Security and the Due Process of Law*, 64 CURRENT LEGAL PROBS. 215 (2011); LUSTGARTEN & LEIGH, *supra* note 82, at 323.

meant by “national security” is a question of construction, and is not a question of law but a matter of judgment and policy on the part of the executive.<sup>156</sup> Safeguarding national security is a fundamental role and duty of Government, and courts have little knowledge or expertise in the empirical or practical dimensions of such assessments.<sup>157</sup> Lord Diplock encapsulated this in his statement in *Council of Civil Service Unions v. Minister for the Civil Service*:

National security is the responsibility of the executive government; what action is needed to protect its interests is . . . a matter on which those on whom the responsibility rests, and not the courts of justice, must have the last word. It is *par excellence* a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves.<sup>158</sup>

Moreover, as the U.K. Government’s Justice and Security Green Paper emphasized, there are few cases in which the courts do not uphold the Government’s claim that public interest immunity is warranted.<sup>159</sup> This strict demarcation of which matters are justiciable and which are the preserve of the executive may stymie effective oversight of decisions not to disclose certain materials, or to hold closed proceedings.

Such deference is not limited to domestic law and courts. The decision in *Glasenapp v. Germany*, for example, demonstrates that the European Court of Human Rights also is prepared to take quite an expansive view of national security, and to yield to executive determinations and requirements in this context.<sup>160</sup> In *Glasenapp* the obligation on civil servants to be loyal and to guarantee the upholding of the free democratic constitutional system within the meaning of the Basic Law was seen to defend the constitutional institutions of the state and thus was a matter of national security in the wider sense.<sup>161</sup> However, in *Chahal v. The United Kingdom*, the ECtHR emphasized that national security issues are not inherently

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156. *Secretary of State for the Home Department v. Rehman* [2001] UKHL 47 [50]. Here, national security was the ground on which the Home Secretary of State was considering a deportation conducive to the public good.

157. *R (Binyam Mohamed) v. The Secretary of State for Foreign and Commonwealth Affairs* [2010] EWCA Civ 65 [131].

158. *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374, 412.

159. U.K. Government, *Justice and Security Green Paper* [2.77] (Cm 8194) (2011).

160. *Glasenapp v. Germany* (1986) 9 Eur. H.R. Rep. 25.

161. See CAMERON, *supra* note 110, at 55.

incapable of being tested in a court.<sup>162</sup> This case concerned the deportation of Chahal on the grounds that his continued presence in the United Kingdom compromised national security. The ECtHR stressed that whereas the use of confidential material may be unavoidable where national security is concerned, this does not imply that national authorities are free from control by the domestic courts whenever they choose to assert that national security and terrorism are involved.<sup>163</sup> The ECtHR further stressed the need to accommodate legitimate security concerns about the nature and sources of intelligence information with the need for procedural justice.<sup>164</sup>

Despite this judicial openness to appraise national security decisions and actions, it remains the case that the courts display considerable deference to the executive in this context. Moreover, as outlined above, it is unlikely that closed material procedures and the system of special advocates incorporate sufficient protections for the individual. So it is suggested here that this classification of organized crime should be resisted, because of the legal and due process implications.

## CONCLUSION

This article has challenged the growing tendency to describe organized crime as a national security threat, drawing on definitional, empirical, and legal arguments. Though it referred to the United Kingdom and British law for the most part, the conceptual arguments are of broader relevance. One may feel that, ultimately, it does not matter whether, to what extent, or how organized crime constitutes a national security threat, as this is an executive determination of a political state of affairs. What this article has sought to emphasize is the worrying degree to which depicting organized crime as a national security threat can stymie or limit debate, both politically and judicially,<sup>165</sup> and the potential consequences for domestic legal practice and due process norms.

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162. *Chahal v. The United Kingdom* (1997) 23 Eur. H.R. Rep. 413.

163. *Id.* at [131].

164. *Id.*

165. Woodiwiss & Hobbs, *supra* note 41, at 123, referring to MARK FINDLAY, *GOVERNING THROUGH GLOBALISED CRIME* (2008); also RICHARD ERICSON, *CRIME IN AN INSECURE WORLD* 48 (2006).



National security threats sometimes may justify deviation from ordinary due process. The central rationale underpinning such procedural rights is that they safeguard against the conviction and punishment of innocent people. So, if compelling evidence suggests that observing these rights in particular cases would result in many innocent people being harmed, then there may be some case for overriding these rights. This provides the rationale for limiting rights in relation to terrorism, for example, even though this theoretical possibility of limiting certain rights to protect others is unlikely to be true in practice. And of course, such a consequentialist argument provides questionable justification for overriding individual rights.

This suggests that the strongest justification for legal exceptionalism in relation to national security relates to state sovereignty. Where there is a risk that certain people or organizations pose a threat to the state's legal authority over a territory or activity, the state might be justified in defending itself against these threats, through the adoption of special legal measures and rules. Even the most severe "ordinary" criminal threat to citizens does not justify equivalent measures to those preserving state sovereignty and authority.

One may dismiss such concerns about describing organized crime as a national security threat by emphasizing that the rhetoric has not yet been translated into widespread practice in a legal or procedural sense. Nonetheless, such a comparison should be opposed, not least given inherent vagueness in definitions of key terms; the inability to first define and then eliminate organized crime means that it serves as a constant means of justifying robust state action and statutory creation. Moreover, it should be resisted most critically because of the potential ramifications, regarding secrecy, accountability, and judicial oversight. Calling (transnational) organized crime a national security threat maintains a view of such crime as "other," as external, as distinct from corporate crime, and ignores public complicity. It is suggested that debate on and reaction to a criminal problem must remain within the criminal law framework, to guard against securitization and the normalization of extraordinary legal measures in the face of an ever-shifting and resilient threat.